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No. 77-1306

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

LEONARD C. JAQUES,

Appellant,

vs.

STATE BAR GRIEVANCE ADMINISTRATOR,

Appellee.

Michigan Supreme Court No. 58697

On Appeal from the Supreme Court of the State of Michigan No. 58697

MOTION TO DISMISS OR AFFIRM APPEAL

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Now Comes Appellee, the State Bar Grievance Administrator, pursuant to Rule 16.1 of the Revised Rules of the Supreme Court of the United States and moves this Honorable Court to dismiss this appeal, or in the alternative affirm the Opinion and Judgment of the Supreme Court of Michigan, on the grounds that the Court does not have jurisdiction of this Appeal and the Appellant's jurisdictional statement does not present a substantial federal question, or, arguendo, it is manifest that the questions on which the decision of this cause depend are so unsubstantial as not to need further argument.

Opinion Below

The Opinion of the Supreme Court of Michigan is reported at 401 Mich 516, 258 NW2d 443 (1977). The Michigan Supreme Court's Order denying rehearing is reported at 402 Mich 595 (1977).

STATEMENT

On or about January 28, 1972, the staff of the Grievance Administrator undertook to investigate allegations of professional misconduct arising out of the tunnel explosion at Port Huron which had claimed twenty-one lives December 11, 1971.

As the result of the investigation a Request for Investigation was prepared and served upon Appellant on or after March 31, 1972. Appellant's answer was filed May 3, 1972. A formal complaint was then prepared and personally served upon Appellant on or about June 29, 1972 who, thereafter, filed a responsive answer. The matter was assigned for trial to Wayne County Hearing Panel No. 17.

The hearing before Panel No. 17 began November 13, 1973. Appellant was represented by experienced counsel, a former assistant United States attorney. The testimony of the following witnesses was taken: Appellant; William Rounsoville; Robert J. McLaughlin; Father Liugi Maggioni; Madalene Williams; and, Rose Woolstenhulme.

On November 14, 1972, before counsel for the Grievance Administrator could continue his presentation, Appellant capitulated and offered to plead no contest to an amended allegation. His plea was accepted and a further hearing was scheduled to permit Appellant an opportunity to present evidence in mitigation of discipline. That meeting convened December 7, 1972 at which time Appellant attempted to offer proof of his innocence of the allegations of the

amended formal complaint. His offer was rejected by the panel. Appellant then filed a motion to set aside the plea on the ground he did not understand the plea and the effect of it, upon which he was afforded a hearing. The motion was denied and Hearing Panel No. 17 filed its report and order suspending Appellant from the practice of law for a period of one year and taxing costs.

Appellant filed a claim of appeal with the State Bar Grievance Board which, after hearing the argument of counsel, entered an order setting aside the plea. The Board dismissed the amended complaint without prejudice and reinstated the original formal complaint which was remanded to Hearing Panel No. 17 "to complete the formal hearing . . . to commence, nunc pro tunc, as of the conclusion of the testimony of . . . the 13th day of November, 1972".

A second formal complaint was filed and served upon Appellant on or after July 16, 1973. The two complaints were then consolidated for trial and assigned to Hearing Panel No. 12, with the prior knowledge of counsel for Appellant, Panel No. 17 having disqualified itself. Panel No. 12 was thereafter disqualified upon Appellant's motion. Appellant was then given his choice of panels but declined. The consolidated complaints were then assigned to Hearing Panel No. 2, whose members were furnished a transcript of the testimony and the exhibits introduced before Panel No. 17. Hearing was scheduled for October 22, 1974.

The hearing commenced October 22, 1974 and a number of preliminary motions by Appellant were denied. Testimony was taken October 22-23, 1974; November 26-27, 1974; January 22-24, 1975; and, May 14-16, 1975. The transcript includes 2263 pages.

At the hearing before Panel No. 2, two of the witnesses, Rose Woolstenhulme and William Rounsoville, who had testified before Panel No. 17, did not appear. Counsel for the Grievance Administrator offered the transcript of the tes-

timony and exhibits of the hearing before Panel No. 17. Over objection, they were admitted into evidence. Upon conclusion of the hearing before Panel No. 2 it filed its report. It found Appellant had violated disciplinary rules in four instances, which are summarized in the lower Court's opinion, Appellant's Appendix, 8a, 9a, and ordered a suspension of 3 years. On appeal to the Grievance Board, it was affirmed, and on appeal to the Michigan Supreme Court, the Court reversed the Panel's findings as to items 4 and 5, because of the use of the transcript of the hearing before Panel No. 17 and affirmed the findings 1 and 2. It reduced the suspension to 2 years.

Appellant filed a Motion for Rehearing. The motion was denied on December 15, 1977, Appendix, 37a, and an amended order was entered on December 20, 1977, Appendix, 39a. On December 19, 1977, Appellant filed a Section 1983 complaint against Respondent in the District Court for the Eastern District of Michigan. He requested a declaratory judgment that the proceedings, including the order of suspension, are violative of his constitutional rights and for a temporary and permanent injunction restraining Respondent from enforcing the order of suspension. A temporary injunction was issued by the Honorable Robert E. DeMascio on December 17, 1977, restraining Respondent from enforcing the order of suspension. At a pretrial hearing, Judge DeMascio requested a stipulation of facts upon which the Michigan Supreme Court relied, bifurcating the facts in 2 issues, viz, (1) Appellant's right to solicit claims to join in a class action suit, and (2) to solicit claimants to start suit for personal injuries. In response to the Court's request and for the purpose of that suit, the stipulation was filed, Appendix, 42a-44a. Motions for summary judgment are pending, awaiting decision.

ARGUMENT

THE COURT LACKS JURISDICTION OVER THIS APPEAL.

Respondent contends the Court lacks jurisdiction because Appellant did not raise the First Amendment claim in the Court below. In *Whitney* v *California,* 274 US 357, 360, 71 L Ed 1095, 1099 (1926) this Court said:

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for *such review was presented in and expressly or necessarily decided by such state court.*" (Emphasis supplied).

At no point in the case, either before the Grievance Board or in the Michigan Supreme Court did Appellant plead First Amendment rights. His grounds for error in the Michigan Supreme Court related to claimed errors of procedure and evidence before the Grievance Board, which he claimed violated due process. The first time he raises the First Amendment is in his motion for rehearing filed in the Michigan Supreme Court and it was not considered or decided by the Court. (Appellant's Appendix, 39a). This is clearly shown by the dissent in the order denying rehearing (Appendix 38a, 40a). Under these facts, this Court has consistently held it has no jurisdiction. ***Brinkerhoff-Farris Trust & Savings Co*** v ***Hill,*** 281 US 673, 74 L Ed 1107 (1930); ***American Surety Co*** v ***Baldwin,*** 287 US 156, 77 L Ed 231, 53 S Ct 98 (1926); ***Live Oak Water Users Asso*** v ***Railroad Commission,*** 269 US 354, 70 L Ed 305, 46 S Ct 149 (1926); ***McGarrity*** v ***Delaware River Bridge Commission,*** 292 US 19, 78 L Ed 1095, 54 S Ct 565 (1949), rehear den,

292 US 19, 78 L Ed 1468, 54 S Ct 771 (1934); *Herndon* v *Georgia,* 295 US 441, 79 L Ed 1530 (1935).

APPELLANT'S JURISDICTIONAL STATEMENT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION NOR DO THE QUESTIONS UPON WHICH THE DECISION OF THIS CAUSE DEPEND NEED FURTHER ARGUMENT.

The history of the United States Supreme Court has yielded less than thirty cases which have warranted argument and opinions concerning the discipline of attorneys for misconduct. A review of all reported decisions of this Court discloses a single case where the State disciplinary proceedings were reversed. *Spevack* v *Klein,* 385 US 511, 17 L Ed 2d 574, 87 S Ct 625 (1967) reversing *Cohen* v *Hurley,* 366 US 117, 6 L Ed 2d 156, 81 S Ct 954 (1961).

More important, perhaps, are at least three opinions of this Court which have reversed Federal system disbarments while refusing to overturn discpline administered the same attorneys, for the same misconduct, by the State systems. *In re Isserman,* 345 US 286, 97 L Ed 1013, 73 S Ct 676 (1953); *Theard* v *United States,* 354 US 278, 1 L Ed 2d 1342, 77 S Ct 1274 (1957); and, *In re Ruffalo,* 390 US 544, 20 L Ed 2d 117, 88 S Ct 1222 (1968).

The reluctance of this Court to review State disciplinary proceedings, and the reason therefor, is set forth in the Court's opinion in *Selling* v *Radford,* 243 US 46, 61 L Ed 585, 37 S Ct 377 (1917):

> In coming to solve that question three things are patent: (a) that we have no authority to re-examine or reverse, as a reviewing court, the action of the supreme Court of Michigan in disbarring a member of the Bar of the courts of that state for personal and professional misconduct; (b) that the order of disbarment is not binding upon us as the thing adjudged in a technical sense, and (c) that albeit this is the case, yet, as we have previously shown, the necessary effect of the action of the supreme court of Michigan, as long as it stands unreversed, unless for some reason it is found that it ought not to be accepted or given effect to, has been to absolutely destroy the condition of fair private and professional character, without the possession of which there could be no possible right to continue to be a member of this Bar. 61 L Ed 587.

Thus, within the narrow limits of review open to this Court, does Appellant's jurisdictional statement present substantial federal questions which need further argument?

A. The Conduct Of Appellant In Soliciting Clients To Join In A Class Action Does Not Come Within The Purview Of *NAACP* v *Button* And Related Cases.

Appellant's statement of the issue on page 15 of his brief is a twisting of the facts. Far from the union seeking Appellant as counsel to represent the injured or families of the killed, it was the Appellant who initiated the meeting with the union representative. It was the Appellant who requested McLaughlin, the union representative to recommend him to his members and gave him cards and contracts for that purpose.

A comparison of the objectives in *NAACP* v *Button,* 371 US 415, 91 L Ed 2d, 83 S Ct 328 (1963); *Brotherhood of Railroad Trainmen* v *Virginia,* 377 US 1, 12 L Ed 2d 89, 84 S Ct 1113 (1964), and *United Transportation Union* v *State Bar of Michigan,* 401 US 576, 28 L Ed 2d 339, 91 S Ct 1076 (1971), and of the Appellant and his objective in the instant case, clearly illustrate the differences and the Appellant's conduct does not fall within the purview of these cases. In *Button,* the NAACP is a non-profit corporation, organized to secure the elimination of all racial barriers

which deprive Negro citizens of the privileges and burdens of equal citizenship rights in the United States. It devotes much of its funds and energies to an extensive program of assisting certain kinds of litigation on behalf of its declared purposes. The Virginia Conference (group of branches of NAACP) maintained a staff of 15 attorneys and ordinarily financed cases in which a litigant retained an NAACP staff lawyer to represent him and the lawyer was paid by NAACP. The staff member may not accept from the litigant or any other source, *any other compensation for his services* in an NAACP case. (Emphasis supplied) Typically, an NAACP branch would invite a staff lawyer to explain to a meeting of parents and children the legal steps necessary to achieve desegregation. He would bring printed forms to the meeting authorizing him, and any other NAACP or Defense Fund attorneys to represent the signers in legal proceedings to achieve desegregation.

In the *Brotherhood of Railroad Trainmen* case, *supra*, the appellant was a union of railroad workers. In order to assist the prosecution of claims by injured railroad workers or by the family of workers killed on the job, the Brotherhood maintains a department of Legal Counsel which recommends to Brotherhood members and their families the names of lawyers whom the Brotherhood believes to be honest and competent.

The rationale of these cases is explained in the *United Transportation* case, *supra*. This was another Brotherhood of Railroad Trainmen case. Mr. Justice Black there explained; 28 L Ed 2d 347:

> *"The common thread running through our decisions in NAACP* v. *Button, Trainmen, and United Mine Workers is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others*

> *the means of enabling their members to meet the costs of legal representation. That was the holding in United Mine Workers, Trainmen, and NAACP* v. *Button."*

These cases are vastly different than this case. Mr. Laughlin, the union agent, was not seeking Appellant to retain him on behalf of his members. Appellant was seeking the union to join in a class action for the benefit of his client in purely personal litigation. As pointed out in *Button,* and the *Trainmen* cases, in the context of the objectives of the Appellant in these cases, *the litigation is not a technique of resolving private differences.* In the case of the *NAACP* it was a means for achieving the lawful objective of equality of treatment for members of the Negro community in this country. In this context it is another form of political activity. In the *Trainmen* cases, it was an effort on the part of the union to aid its members, who were killed or injured, by obtaining competent lawyers at reasonable fees. There are no such objectives by Appellant here. The attempt by Appellant, on page 17 of his brief to so equate his action, is ludicrous.

Moreover, as pointed out by the Michigan Supreme Court, Appendix, 17a, n 6, "There was no absolute need to enlist others to join in the proposed class action as parties plaintiff. F.R. Civ. P. 23 allows one person to bring suit on behalf of the class."

B. Solicitation Of Clients By Lawyers Is Not Protected By The First Amendment.

That the State has a deep interest in regulating the activities of lawyers is unquestioned. The Court in *Bates* v *State Bar of Arizona,* 433 US 350, 53 L Ed 2d 810, 822, 97 S Ct 2691 (1977), conceded:

"[T]he regulation of the activities of the bar is at the case of the State's power to protect the public. Indeed, this Court in *Goldfarb* acknowledged that [t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the Courts. 421 US at 792, 44 L Ed 2d 572, 95 S Ct 2004. See *Cohen* v *Hurley,* 366 US 117, 123-124, 6 L Ed 2d 156, 81 S Ct 954 (1961). More specifically, controls over solicitation and advertising by attorneys have long been subject to the State's oversight. Federal interference with a State's traditional regulation of a profession is entirely unlike the intrusion of the Court sanctions in *Cantor.*"

That soliciting leads to evils injurious to the public cannot be doubted. One has only to look at *Cohen* v *Hurley,* 366 US 117, 6 L Ed 2d 156, 81 S Ct 954, reh den 374 US 857, 10 L Ed 2d 1083, 83 S Ct 1860 (1961); *Anonymous* v *Baker,* 360 US 287, 3 L Ed 2d 1234, 79 S Ct 1157 (1959) and *NAACP* v *Button,* 9 L Ed 2d at 422-423. Abolishing the barriers against solicitation will lead to unseemly competition by lawyers and their runners to sign up personal injury victims, leading to their harrassment. In this day of sophisticated electronic devices and radio, runners have reached the scene of the accident or sooner than the police and the competition to secure the client becomes intense.

That there was adequate evidence of Appellant's solicitation is established by the lower Court's opinion. Even the dissenting members of the Court concede. "There was indeed substantial evidence that supports the finding Jaques asked a union official to recommend him to persons who had claims." Appendix, 22a.

That the Court struck down the disciplinary rules relating to advertising, *Bates* v *State Bar of Arizona, supra,* does not require it to vitiate the disciplinary rules relating

to soliciting. There is a great difference between advertising and personal solicitation. As the Court said, "In fact because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services — . . . are not susceptible to measurement or vertification; . . . similar objections might justify restraints on in person solicitation." 53 L Ed 2d 835-836. It is just these kinds of claims and others, relating to how much the lawyer can get or has obtained in other cases, that the public is so susceptible to in person solicitation. In fact, in this case, it is this kind of claim made by Appellant of his success in previous case and the quality of his services, which was his pitch to the union representative.

C. The Due Process Violations Claimed By The Appellant Do Not Involve Federal Questions And Are Not Subject To Review By This Court.

The Appellant's claims of due process violations are frivolous. Due process means a fair trial and this he received. He was represented by counsel, over 2000 pages of testimony was taken. He was permitted to call all the witnesses he wanted, except one, Appellee's counsel who refused to testify. All the matters complained of relate to State Law and do not involve Federal or constitutional questions. This Court does not sit as a reviewing Court of any claimed errors by the lower Court. *Selling* v *Radford, supra, Theard* v *United States,* 354 US 278, 1 L Ed 2d 1342, 77 S Ct 1274 (1957).

CONCLUSION

For the foregoing reasons it is respectfully submitted Appellant's jurisdictional statement does not show the Court has jurisdiction and does not present a substantial Federal question, nor do the questions upon which the decision of this cause depends need further argument. The appeal should be denied, or, in the alternative, the Opinion and Judgment of the Supreme Court of Michigan affirmed.

Respectfully submitted,

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